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Racism 4.0, Civity, and Re-Constitution

by PALMA JOY STRAND*

The moral arc of the universe is long, but it bends toward justice.

~The Rev. Dr. Martin Luther King, Jr.¹

Introduction

I begin this essay with a personal introduction. All of us understand the world through our own stories. And the stories that we send out into the world are most useful in contributing to our collective story if we honestly acknowledge that they arise from individual experiences.²

* Professor of Law, Creighton Law School and the Werner Institute; Director, 2040 Initiative. B.S., Stanford University (1978); J.D., Stanford Law School (1984); LL.M., Georgetown University Law Center (2006). Many thanks to Malka Kopell, my co-founder in The Civity Initiative, for her invaluable contributions to both the idea and the reality of civity. Thanks also to Marty Swaim for our extensive discussions of and work together on race, racial identity, racism, White privilege, and white advantage. In addition, conversations with my co-authors during the process of writing *GAINING ON THE GAP: CHANGING HEARTS, MINDS, AND PRACTICE* (2011) were enormously helpful. So too have been conversations with my longstanding Book Group in the Washington DC area. The Global Health Conference Midwest, held at Creighton University on January 30–31, 2015, provided a welcome opportunity to present many of the ideas in this Article. Thanks also to Greg O'Meara for collegial enthusiasm and support. Finally, I very much appreciate the Creighton Law School summer research fellowships, the Dr. George M. Haddix faculty grant that provided seed resources for the 2040 Initiative, and Dean Marianne Culhane for her stalwart support of the Initiative.

1. QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2012/11/15/arc-of-universe/> (Dr. King paraphrasing Unitarian Minister, Transcendentalist, and Abolitionist Theodore Parker from 1857: "Look at the facts of the world. You see a continual and progressive triumph of the right. I do not pretend to understand the moral universe, the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. But from what I see I am sure it bends towards justice.")

2. Palma Joy Strand, *Law as Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 SO. CAL. INTERDISC. L.J. 603, 626–30 (2009). See George Yancy and Linda Martin Alcoff, *Philosophy's Lost Body and Soul*, N.Y. TIMES (Feb. 4, 2015), available at <http://opinionator.blogs.nytimes.com/2015/02/04/philosophys-lost-body-and-so>

I am a White woman; my husband is a Black man.³ We were married in the Commonwealth of Virginia in 1984, seventeen years after the landmark Supreme Court decision in *Loving v. Virginia*⁴ held state laws against interracial marriage unconstitutional.⁵ My biracial children drew me into issues of educational disparity. The public schools they attended in Arlington, Virginia, engaged in a tempestuous soul-searching process around acknowledged achievement gaps between White students and Black and Latino students. My participation included contributing to cultural competence training for the district,⁶ which shifted and deepened my understanding of race and racism. Conversations within my family added a powerful dimension.

At Creighton University, the interdisciplinary 2040 Initiative⁷ offers a framework for pursuing issues of equity related to race. The 2040 Initiative responds to demographic projections that a shift will occur in the United States population over the next generation: By about the year 2040, non-Hispanic Whites will be a minority.⁸ The 2040 Initiative faces and facilitates constructive public dialogue around this dramatic shift. We contribute to decisions and actions to “not just make the best of the changes that are coming but to make the best the changes that come.”⁹

ul/?_r=0 (discussing limitations of traditional Western philosophy based on its restriction to White subjectivity: “Knowledge requires self-knowledge”).

3. In this Article, except when quoting others, the racial descriptors I use are Black and White. See BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 15–17 (1997); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 455 n.12 (2010).

4. *Loving v. Virginia*, 388 U.S. 1 (1967).

5. *Id.*

6. See generally ROBERT G. SMITH ET AL., *GAINING ON THE GAP: CHANGING HEARTS, MINDS, AND PRACTICE* (2011) (narrative of background and development of APS cultural competence initiative, co-authored by former Superintendent and other school system personnel as well as this author).

7. Creighton University, *Addressing the Challenges that Await Our Changing Nation*, <http://law.creighton.edu/current-students/academics/2040>.

8. JENNIFER M. ORTMAN, *A LOOK AT THE U.S. POPULATION IN 2060* 14 (Dec. 14, 2012), http://www.census.gov/newsroom/cspan/pop_proj/20121214_cspan_popproj.pdf (population projected to become “majority minority” around 2043).

9. Palma Joy Strand, *The Power of ‘It is’*, CREIGHTON UNIVERSITY BLOG (Jan. 26, 2015), <http://blogs.creighton.edu/creighton2040/2015/01/26/the-power-of-it-is/>.

The Civity Initiative¹⁰ reinforces the insights that equity is fundamental to a healthy democracy¹¹ and that both equity and democracy are rooted in relationships as well as in formally enacted law.¹² Civity—people working together to tackle complex civic challenges¹³—emerges from relationships of respect, empathy, and trust across social dividing lines and the vibrant civic networks that result from those relationships.¹⁴ In contrast, attenuated or absent relationships leave gaping holes in the civic fabric, which undermines democracy. Civity surmounts racism by building bridges over the social chasm of race.

I. Racism 4.0

Bryan Stevenson, Law Professor and Founder and Executive Director of the Equal Justice Initiative, takes the long view of racism in the United States. In 2014, he identified four manifestations of racism over the multi-century arc of our nation's history.¹⁵ Racism, deeply embedded in our culture, has evolved over time.¹⁶

I label these “operating systems” Racism 1.0, Racism 2.0, Racism 3.0, and—the current “update”—Racism 4.0. These versions of racism reflect a chronological progression characterized by distinctive iterations of social mores, institutions, and law. Yet the four versions overlap; as with different operating systems, earlier versions are still around and running on at least some computers even as updated versions have become the norm.

10. The Civity Initiative, *What is Civity?*, <http://www.civity.org/> (last visited Apr. 1, 2015).

11. See Palma Joy Strand, *Is Brown Holding Us Back? Moving Forward, Six Decades Later: Visionary States, Civic Locals, and Trusted Schools and Teachers*, 23 KAN. J.L. & PUB. POL'Y 283, 289–90 (2014) (discussing equality as a core value of democracy).

12. See Strand, *Law as Story*, *supra* note 2, at 618–26; Palma Joy Strand, *The Civic Underpinnings of Legal Change: Gay Rights, Abortion, and Gun Control*, 21 TEMP. POL. & CIV. RTS. L. REV. 117, 134–49 (2011).

13. Civity Strategic Plan, January 2015 (on file with author); see also Palma Joy Strand, *Cultivating “Civity”: Enhancing City Resilience with Bridging Relationships and Increased Trust*, 50 IDAHO L. REV. 153, 167–77 (2014).

14. See, e.g., Strand, *Civic Underpinnings*, *supra* note 12, at 137–41 (respect); Strand, *Cultivating “Civity,”* *supra* note 13, at 183–90 (trust). See also John Esterle, Malka Kopell, & Palma Strand, *From the Kids' Table to the Adults' Table: Taking Relationships Seriously in a World of Networks*, SSRN 2 (July 1, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320196 (“trust, respect, and empathy”).

15. Bryan Stevenson, *School Reform Initiative Winter Meeting Closing Speech* (Jan. 19, 2014), available at <https://www.youtube.com/watch?v=ky9VQeDeh5Q&feature=youtu.be>.

16. *Id.*

Racism 1.0 was slavery, the enslavement first of Africans and then of their descendants. The Civil War,¹⁷ the Emancipation Proclamation,¹⁸ and the Thirteenth Amendment to the United States Constitution¹⁹ abolished slavery in this country. The Fourteenth and Fifteenth Amendments²⁰ along with the Civil Rights and Reconstruction Acts of the late 1860s and early 1870s went further, affirmatively protecting civil and political rights for Black citizens.²¹

Racism 2.0 was the reign of violence and lynching during which Whites sought to control and marginalize Blacks, primarily but not exclusively in the South.²² This domestic terrorism spanned decades from the latter part of the 1800s well into the 1900s²³ and was a major cause of the Great Migration,²⁴ the exodus of “some six million black southerners” over six decades out of the South to the relatively benign environments of the Northeast, Midwest, and West.²⁵

Racism 3.0 emerged as Whites regained control in the post-Reconstruction South, and it spread to the rest of the country as Black populations grew with the Great Migration. In the South, Racism 3.0 took the form of “Jim Crow,” legislatively enacted separation by race with “separate but equal” rhetoric²⁶ and “separate

17. PBS, *The Civil War and Emancipation*, <http://www.pbs.org/wgbh/aia/part4/4p2967.html> (last visited Apr. 1, 2015).

18. Civil War Trust, *10 Facts about the Emancipation Proclamation*, <http://www.civilwar.org/education/history/emancipation-150/10-facts.html> (last visited Apr. 1, 2015).

19. U.S. CONST. amend XIII (1865).

20. U.S. CONST. amend XIV (citizenship and Equal Protection of the laws, 1868); U.S. CONST. amend XV (voting, 1870).

21. Civil Rights Act of 1866, 14 Stat. 27–30 (defining citizenship and equal protection); Civil Rights Act of 1875, 18 Stat. 335–337 (mandating equal treatment in public accommodations and transportation; prohibiting exclusion from jury service); Reconstruction Acts of 1867, 15 Stat. 2 (providing for military occupation of the South and setting forth terms for readmittance of Southern states to the Union with parameters for new state constitutions including the abolition of slavery).

22. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR, SUPPLEMENT* (2015) (lynchings in Southern states by county). Lynchings were not restricted to the South, however. See, e.g., Orville D. Menard, *Lest We Forget: The Lynching of Will Brown, Omaha's 1919 Race Riot*, 91 NEBRASKA HISTORY 152 (2010).

23. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 4–5 (2015) (“3,959 lynchings of black people in twelve Southern states between the end of Reconstruction in 1877 and 1950”).

24. *LYNCHING IN AMERICA*, *supra* note 22, at 5.

25. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 9 (2010).

26. *Plessy v. Ferguson*, 163 U.S. 537 (1896). See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 108–17 (1996).

and unequal” reality.²⁷ Nationally, residential segregation, enforced through racially restrictive covenants²⁸ and the federal policy of redlining, disfavored those who chose (Whites) or were forced (Blacks and others) to purchase homes in non-White or racially integrated neighborhoods.²⁹ The Civil Rights Movement, the Equal Protection litigation campaign of the NAACP Inc. Fund, including the keystone decision in *Brown v. Board of Education*,³⁰ and the legislative triumvirate of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968³¹ neutralized Racism 3.0’s overt discrimination.

By the mid-1970s, however, it became apparent that Equal Protection doctrine invalidated intentional and individual acts of discrimination but not incidental or systemic discrimination. For example, the Court in *Washington v. Davis*³² and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*³³ declared that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”³⁴ At the same time, *Milliken v. Bradley*³⁵ revealed a Supreme Court that was unwilling to take on systemic arrangements such as school district boundaries in the cause of desegregation.³⁶ Overall, the anti-discrimination law that emerged to counter Racism 3.0 was limited to addressing overt actions.

Anti-Racism-3.0 law does not reach today’s variation, Racism 4.0, which manifests as patterns of racial disparity. Though stark,

27. HIGGINBOTHAM, *supra* note 26, at 117–18; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (declaring that courts could not constitutionally enforce racial covenants on real estate).

29. See PBS, *Race: The Power of an Illusion*, Episode 3: “The House We Live In” (2003); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 110–13 (2004).

30. See Strand, *Law as Story*, *supra* note 2, at 615–17 (drawing from MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)).

31. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965); Fair Housing Act of 1968, Pub. L. No. 90–284, 82 Stat. 73 (1968).

32. *Washington v. Davis*, 426 U.S. 229 (1976).

33. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

34. *Id.* at 265.

35. *Milliken v. Bradley*, 418 U.S. 717 (1974).

36. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (refusing to address Texas statewide system of financing public schools).

these patterns generally do not result from explicit or intentional racial discrimination. Nor are they the product of specific, identifiable policies. Because of their systemic and non-invidious character, they lie beyond the reach of current anti-discrimination law. These disparities do not run afoul of the Equal Protection Clause because discriminatory purpose (as opposed to discriminatory effect) is absent.³⁷ Nor do the protections of the Civil Rights or Fair Housing Acts apply: Even the disparate impact doctrine does not encompass disparities that do not result from an identifiable policy or law but from the combined effects of multiple policies, laws, and individual actions.³⁸

Bryan Stevenson identifies the mass incarceration of Black men as the current manifestation of racism.³⁹ Blacks are “13% of the general U.S. population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row.”⁴⁰ I see this specific disproportionality as only one facet of Racism 4.0—though an especially poisonous and devastating one.⁴¹

Racism 4.0 is also characterized by racially disparate outcomes in education, health, economic resources, housing, and employment. In education, Black students lag behind in academic achievement in reading and math⁴² while being more likely to be referred for special

37. *Davis*, 426 U.S. 229.

38. Disparate impact claims under Title VII of the Civil Rights Act of 1964, for example, allow for a finding of discrimination based on disparate racial results from an employment practice or policy. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). With respect to disparate impact in housing, the Supreme Court will be deciding this term whether the Fair Housing Act gives rise to disparate impact claims at all. *See Tex. Dep’t of Hous. & Cmty. Affairs v. The Inclusive Cmty. Project*, Docket No. 13–1371, 747 F.3d 275 (2014); Emily Badger, *The Supreme Court may soon disarm the single best weapon for desegregating U.S. housing*, WASH. POST (Jan. 21, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/21/the-supreme-court-may-soon-disarm-the-single-best-weapon-for-desegregating-u-s-housing/>.

39. *See supra* note 14.

40. Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, Mar. 2009, at 2.

41. *See, e.g., HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 27–32 (2003); *see generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (documenting massively disproportionately incarceration of Black men).

42. *See* Alan Vanneman et al., *Achievement Gaps: How Black and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*, NATIONAL CENTER FOR EDUCATION STATISTICS, July 14, 2009 (average White student test scores higher than average Black student test scores on all assessments at all levels).

education⁴³ and disciplined than other students.⁴⁴ In health, our Black population experiences high infant mortality,⁴⁵ lacks health insurance,⁴⁶ and has lower life expectancy.⁴⁷ In economics, Black family income is less than two-thirds of White family income,⁴⁸ and Black family wealth is on average one-twentieth of White family wealth.⁴⁹ High degrees of segregation in housing continue in metropolitan areas,⁵⁰ and a disproportionately high proportion of Black citizens live in high-poverty neighborhoods.⁵¹ The

43. Russell Skiba et al., *The Context of Minority Disproportionality: Practitioner Perspectives on Special Education Referral*, 108 TEACHERS COLLEGE RECORD 1424, 1425 (2006).

44. Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?* 39 EDUCATIONAL RESEARCHER 59, 59 (2010).

45. *The Affordable Care Act and African Americans*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Nov. 5, 2013), <http://www.hhs.gov/healthcare/facts/factsheets/2012/04/aca-and-african-americans04122012a.html> (Black infant mortality rate is 2.3 times the rate of non-Hispanic whites).

46. *Id.* ("African-Americans are 55 percent more likely to be uninsured than white Americans").

47. Kenneth D. Kochanek, Elizabeth Arias, & Robert N. Anderson, *How Did Cause of Death Contribute to Racial Differences in Life Expectancy in the United States in 2010?*, NCHS Data Brief No. 125 (July 2013) ("The gap in life expectancy between the white and black populations has decreased, from 7.6 years in 1970 to 3.8 years in 2010, but the disparity still exists.").

48. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2013 7 (2014) (in 2013, "the ratio of Black to non-Hispanic White income was 0.59").

49. Palma Joy Strand, *Education-as-Inheritance Crowds Out Education-as-Opportunity*, 59 ST. LOUIS U. L.J. 283, 290 n. 45 (2015).

50. Heller School for Social Policy and Management, *Segregation of the Population: Dissimilarity with Non-Hispanic Whites by Race/Ethnicity (2010 data)*, DIVERSITYDATA.ORG, (top 100 metropolitan areas range from 81.5% dissimilarity in Milwaukee, WI, to 21.9% in Provo, UT, with 100% representing absolute Black-White residential segregation and 0% representing absolute integration), available at <http://www.diversitydata.org/Data/Rankings/Show.aspx?ind=163&ch=6&tf=38&sortby=Value&sortChs=6&sort=HighToLow¬es=True&rt=MetroArea&rgn=ShowLargest100>. See also *Racial Dot Map*, 2010 CENSUS BLOCK DATA, <http://demographics.coopercenter.org/DotMap/>.

51. *Id.*; The Heller School, *Share of Population Living in High Poverty Neighborhoods by Race/Ethnicity (2000 data)*, available at <http://www.diversitydata.org/Data/Rankings/Show.aspx?ind=48&ch=6&tf=3&sortby=Value&sortChs=6&sort=HighToLow¬es=True&rt=MetroArea&rgn=ShowLargest100> (last visited Apr. 1, 2015) (top 100 metropolitan areas range from 81.2% of Black population in high-poverty neighborhoods in Buffalo, N.Y., to 5.3% in San Jose, Cal.). See also CASHIN, *supra* note 29, at 240–41 (discussing "hypersegregation" of poor Blacks, as per the analysis in DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74–78 (1993)).

unemployment rate for Black workers is about twice that for White workers.⁵²

As it stands, Equal Protection jurisprudence is incapable of countering racism in the current form of substantial racial disparities. Determined ahistoricism, such as that exhibited by the Supreme Court in *Shelby County v. Holder*,⁵³ now often accompanies the focus on discriminatory intent with individual consequences. Judicial remedies for Black citizens are suspect,⁵⁴ grudging,⁵⁵ or refused outright.⁵⁶ Chief Justice Roberts's reasoning that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"⁵⁷ reflects an almost surreal blindness to racial realities.⁵⁸ And yet this learned legal helplessness is almost inevitable with a view of racism that sees only individual causation and harm, that does not see systems at work. From a Racism 3.0 point of view, the Court's constitutional ruling to limit the Affordable Care Act's Medicaid

52. *The color of unemployment*, FACE THE FACTS USA, A PROJECT OF THE GEORGE WASHINGTON UNIVERSITY (14.1% unemployment rate for African Americans compared to 7.2% for Whites in mid-2012).

53. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking as unconstitutional the Voting Rights Act provision developed in 1975 because the nation "has changed"). See also Emma Coleman Jordan, *For Clarence Thomas, Lynching is Personal. Only*, WASH. POST OPINIONS (Oct. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/12/AR2007101201883.html> (criticizing Thomas for "adamantly refus[ing] to consider the history of racial discrimination and violence as justifications for remedies designed to right discriminatory wrongs").

54. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (requiring compelling interest for minority set-aside in city contracts); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications applied by federal government in contracting); *Shaw v. Reno*, 509 U.S. 630 (1993) (applying strict scrutiny to redistricting).

55. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (diversity of student body sufficient interest to justify law school admissions policy under which race was one of multiple factors). See also *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013). But see *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating undergraduate admissions policy that assigned specific weight to race).

56. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school assignments to address residential segregation in the context of K-12 schools not adequately "narrowly tailored" to interest); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (state constitutional amendment banning affirmative action in public university admissions does not violate the Equal Protection Clause).

57. *Parents Involved*, 551 U.S. at 748.

58. Compare *Schuette*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.").

expansion⁵⁹ does not even present a racial issue. From a Racism 4.0 perspective, the Court's ruling and its repercussions allow uncabined disparities in health care.⁶⁰

II. Racism 4.0 “Software” and “Hardware”

The persistence of Racism 4.0 and the lack of legal remedies to address it call for searching inquiry into how it operates: If overt discrimination does not cause the observed racial disparities, what does? I see two distinct though intertwined strands of causation, each of which has two aspects. The first strand consists of personal interactions, what we might think of as the “software” of Racism 4.0. The first aspect of these personal interactions, implicit bias, is anti-Black; the second, White privilege, is pro-White. The second strand is comprised of social structures, what we might think of as the “hardware” of Racism 4.0. Again, the first aspect of these social structures, structural racism, is anti-Black; the second, white advantage, is pro-White. I describe each of these separately and then discuss how they operate together.

A. “Software”—Implicit Bias

Psychologists Tony Greenwald, Mahzarin Banaji, and Brian Nosek developed the Implicit Association Test (“IAT”) in 1998 to discern “attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional

59. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

60. Rachel Garfield et al., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid—An Update* (Nov. 12, 2014), available at <http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid-an-update/> (“Because racial/ethnic minorities are more likely than White non-Hispanics to lack insurance coverage and are more likely to live in families with low incomes, they are disproportionately represented among poor uninsured adults and among people in the coverage gap.”); Jamelle Bouie, *Thanks to the GOP, 5 Million Americans Won’t Get Health Insurance*, THE DAILY BEAST (Dec. 31, 2013), available at <http://www.thedailybeast.com/articles/2013/12/31/thanks-to-republicans-5-million-americans-can-t-get-health-insurance.html> (“The 25 states that have rejected the expansion are home to the majority of the nation’s poor, uninsured blacks, a direct product of our long history of racist policy making.”); Jamelle Bouie, *How the South Blocked Health Care for Those Who Need It Most*, THE DAILY BEAST (Oct. 3, 2013), available at <http://www.thedailybeast.com/articles/2013/10/03/how-the-south-blocked-health-care-for-those-who-need-it-most.html>.

control.”⁶¹ For race, the IAT assesses the degree to which people unconsciously associate “European American” and “African American” with “good” and “bad” by measuring reaction times for takers to correlate race with positives and negatives.⁶² Results over more than seven hundred thousand tests show that “most Americans have an automatic preference for white over black.”⁶³

The fundamental characteristic of implicit bias is precisely that it is implicit rather than explicit, unintentional rather than intentional, unconscious rather than conscious. Humans are hardwired to take cognitive shortcuts based on prior personal experiences and cultural messages and norms that we internalize through socialization.⁶⁴ Implicit bias, including implicit racial bias, does “not necessarily align with our declared beliefs”⁶⁵ but can have “real-world effects on behavior.”⁶⁶ Individuals harboring implicit bias may act on that bias—in the context of race acting to disadvantage Blacks and prefer Whites—without being aware that they have such bias or that they are acting upon it. Many who vehemently disclaim racism carry the racism virus and are unknowingly affected by it.

B. “Software”—White Privilege

In 1988, Professor Peggy McIntosh published her landmark essay “White Privilege: Unpacking the Invisible Knapsack.”⁶⁷ In this essay McIntosh applied Women’s Studies insights about male privilege to the privilege of being White. She likened White privilege to “an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.”⁶⁸ This White privilege is similar to implicit bias in that the person who wears it is

61. CHERYL STAATS, KIRWAN INSTITUTE, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 16; Justin D. Levinson, Danielle M. Young, & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 9 (Justin D. Levinson & Robert J. Smith eds., 2012).

62. *About the Implicit Association Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html>.

63. *Race Attitude*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo/background/raceinfo.html>.

64. See generally WRAY HERBERT, ON SECOND THOUGHT: OUTSMARTING YOUR MIND’S HARD-WIRED HABITS (2010) (describing both evolutionary benefits and contemporary pitfalls of human cognitive shortcuts).

65. STAATS, *supra* note 61, at 17.

66. *Id.*

67. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1988).

68. *Id.* at 1.

unaware of it and its contents. In fact, McIntosh wrote, "I was 'meant' to remain oblivious."⁶⁹

McIntosh listed twenty-six characteristics of White privilege, including shopping without being followed or harassed, not being seen as a representative of the entire White race, and having same-race role models in curricula and public settings.⁷⁰ Many of these, she pointed out, are "positive advantages" that everyone should have and that "we can work to spread;" others are "negative types of advantages which unless rejected will always reinforce our present hierarchies."⁷¹

Among the negative advantages, I find number sixteen to be particularly salient: "I can remain oblivious of the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty for such oblivion."⁷² I see number sixteen as the core of White privilege. It captures the power dynamic of Whiteness as the norm, which marginalizes and silences those who are not White. At the same time, it hides from those who are White the reality that they are also raced, that Whiteness is all-too-frequently taken as the cultural and human norm, and that the White experience and the White story are actually only one experience, one story that by no means represents the story of all of humanity.⁷³

C. "Hardware"—Structural Racism and White Advantage

Structural racism and White advantage are the two sides of a single coin. The coin in this metaphor represents access to actual resources that make a tangible difference in the quality of people's lives. Over the course of our history, public policies that imposed disadvantages on Blacks have benefited Whites; conversely, public policies that offered advantages to Whites have excluded Blacks. The accumulation of advantages by Whites and disadvantages by Blacks has, in combination with deep racial separation, led to a Black

69. *Id.* See also TIM WISE, WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON 15–59 (2005) (personal experiences of White privilege); THANDEKA, LEARNING TO BE WHITE: MONEY, RACE, AND GOD IN AMERICA 1–19 (1999) (socialization of Whites).

70. McIntosh, *supra* note 67, at 1–2.

71. *Id.* at 3.

72. *Id.* at 2.

73. See Strand, *Law as Story*, *supra* note 2, at 628–30 (describing marginalization of stories, including Black stories). As Philosopher Linda Martin Alcoff observes, "[e]ntitlement is a core feature of white subjectivity." Yancy & Alcoff, *supra* note 2.

citizenry that as a group has less and a White citizenry that as a group has more.⁷⁴ This is the “hardware” on which the “software” of implicit bias and White privilege runs.

Slavery, as an institution, consisted of *de jure* economic arrangements that systematically enriched Whites and divested Blacks of the tangible benefits of their labors. Southern slave-owners and those who profited from the slave economy directly benefited from the institution of slavery. Northern Whites did as well through the accumulation of wealth derived from slavery.⁷⁵ Significant components of our physical infrastructure, including the United States Capitol Building, were also built by enslaved persons.

Far-reaching public programs that enriched the citizenry, programs that were primarily accessible to Whites and substantially inaccessible to Blacks, augmented the White wealth that existed when slavery ended. The 2003 California Newsreel film “Race: The Power of an Illusion,”⁷⁶ summarizes the series of federal investments and actions that subsidized White wealth creation: “A Long History of Affirmative Action—For Whites.”⁷⁷ In the 1860s, the Homestead Acts opened up huge tracts of land in the Midwest and West to those who settled on them; the 10% of the nation’s land that was transferred to private ownership through these Acts went overwhelmingly to Whites, including White immigrants.⁷⁸ Formerly enslaved persons, in contrast, did not receive the “forty acres and a mule” that would have provided a property foundation on which to build prosperity.⁷⁹

In 1935 the Social Security Act, which created an economic cushion for our elderly citizens, excluded domestic and agricultural

74. Strand, *Inheriting Inequality*, *supra* note 3, at 461–63, 473–77; MEIZHU LUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* 73–130 (2006); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* 25–53 (1999, 2010).

75. See, e.g., ANNE FARROW, JOEL LANG & JENIFER FRANK, *COMPLICITY: HOW THE NORTH PROMOTED, PROLONGED, AND PROFITED FROM SLAVERY* (2005).

76. See *supra* note 29.

77. Larry Adelman, *Essay*, <http://newsreel.org/guides/race/whiteadv.htm>. See also LUI ET AL., *supra* note 74, at 225–66.

78. Adelman, *supra* note 77. This land was forcibly taken from Native American Indian tribes, who have also been the targets of racism for centuries. It is also no accident that White immigrants (including my own Swedish forebears) benefited disproportionately from homesteading; United States immigration policies discriminated explicitly by race until the 1960s.

79. LUI ET AL., *supra* note 74, at 85.

workers, two occupations in which Blacks were heavily represented.⁸⁰ This cushion benefitted not only the elderly, but also their children, who received relief from the economic burden of supporting aging parents.⁸¹ The same year, the Wagner Act instituted labor protections enabling unions to bargain collectively on behalf of their members.⁸² Those unions, however, were allowed to discriminate on the basis of race in determining membership, which reserved to White workers jobs and the benefits associated with those jobs. As with Social Security, racialized unions affected the economic well-being not only of individuals but also of their families.

In the mid-1900s the federal government also acted to support White citizens in terms of housing. "Between 1934 and 1962, the federal government backed \$120 billion of home loans. More than 98% went to whites."⁸³ Federal Housing Administration guidelines for home mortgages explicitly preferred all-White neighborhoods—and the Whites who could buy there—and channeled loans away from predominantly Black or racially mixed neighborhoods—and the Blacks and other racial minorities who were restricted to buying there.⁸⁴ Non-White neighborhoods were "redlined" on maps; disinvestment in those neighborhoods led to lower housing values, lower home equity for Blacks, and lower household wealth overall.⁸⁵

Another mammoth federal public works project following World War II reinforced and magnified spatial racial separation by neighborhood. The interstate highway system provided the physical infrastructure for suburbanization, which led to Whites creating racial-residential enclaves within commuting distance of city centers.⁸⁶

80. *Id.* at 92. Because of these exclusions, 65% of the Black work force, as versus 27% of the White work force, was originally excluded from Social Security. Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, <http://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html>. Social Security was extended to include these occupations in 1950. Wilbur J. Cohen & Robert J. Myers, *Social Security Act Amendments of 1950: A Summary and Legislative History* (1950), <http://www.ssa.gov/history/1950amend.html>.

81. Strand, *Education-as-Inheritance*, *supra* note 49, at 286–87.

82. Adelman, *supra* note 77.

83. Adelman, *supra* note 77.

84. Kenneth Jackson, *The Federal Housing Administration*, in KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203–09, 213–18 (1985).

85. PBS, *Race: The Power of an Illusion*, *supra* note 29; Strand, *Inheriting Inequality*, *supra* note 3, at 462; LUI ET AL., *supra* note 74, at 97–98.

86. CASHIN, *supra* note 29, at 113–15.

Racial and socioeconomic exclusionary zoning⁸⁷ created “hypersegregation” between suburban Whites and a significant number of Black citizens in impoverished inner city neighborhoods.⁸⁸

Spatial separation by race has proven to be a powerful vehicle for the creation of White advantage and Black disadvantage. Relatively affluent White communities, assisted by generous municipal incorporation and local district creation state laws, have successfully garnered for themselves robust tax bases comprised of higher-value White homes and the businesses that locate near them.⁸⁹ These tax bases enable White jurisdictions to enjoy both low tax rates and generous public services,⁹⁰ including quality public education through which the human capital of the next generation is developed.⁹¹ Tax subsidies in the form of home mortgage deductions support these amenities.⁹²

Spatial concentrations by race at the state level are deeper and similarly devastating. Southern states with high Black populations and long histories of racial oppression continue to display political cleavages that embed often-insurmountable barriers to investment in citizens in the form of health⁹³ and education⁹⁴ in conjunction with violence-based forms of social control.⁹⁵ The legacy of slavery persists today in cultural anti-Black attitudes held by Southern Whites.⁹⁶

87. *Id.* at 104–10; *Arlington Heights*, 429 U.S. 252.

88. *See supra* note 50 and accompanying text.

89. CASHIN, *supra* note 29, at 108.

90. *See, e.g., Rodriguez*, 411 U.S. at 12–15 (White, J., dissenting) (highlighting stark differences in fiscal resources between Edgewood and Alamo Heights School Districts).

91. *See Strand, Education-as-Inheritance*, *supra* note 49, at 285–86 (education as investment in human capital).

92. John Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 733–34 (1988); Strand, *Education-as-Inheritance*, *supra* note 49, at 293–94 & n. 68.

93. *See, e.g.,* Jamelle Bouie, *Mississippi's Race to the Bottom*, SLATE (Oct. 30, 2014), available at http://www.slate.com/articles/news_and_politics/politics/2014/10/mississippi_the_affordable_care_act_and_racism_the_state_s_failures_are.html (hereinafter Bouie, *Mississippi*); Jamelle Bouie, *How the South Blocked Health Care for Those Who Need it Most*, THE DAILY BEAST (Oct. 3, 2013), <http://www.thedailybeast.com/articles/2013/10/03/how-the-south-blocked-health-care-for-those-who-need-it-most.html>.

94. *See Bouie, Mississippi*, *supra* note 93; Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 324–25.

95. *See Bouie, Mississippi*, *supra* note 93; Colin Woodard, *Up in Arms*, TUFTS MAGAZINE (Fall 2013), available at <http://www.tufts.edu/alumni/magazine/fall2013/features/up-in-arms.html>.

96. Avidit Acharya, Matthew Blackwell, & Maya Sen, *The Political Legacy of American Slavery* (Nov. 2014), <http://www.mattblackwell.org/files/papers/slavery.pdf>.

States' rights principles provide the "neutral" justification for sanctioning state-based laws and policies that reflect and entrench these attitudes and the racial hierarchy they represent and reinforce.

D. "Software" and "Hardware" Together—Institutional and Systemic Racism

Institutions and social systems are constituted of and by the individuals who comprise them; they function by virtue of those individuals interacting with each other and with outsiders. All institutions and social systems have cultures, patterns of interactions complete with interlocking roles.⁹⁷ These roles are communicated by cultural customs and stories—formal and informal, explicit and implied.⁹⁸

Implicit associations affect how individuals perceive and interact with other people. Implicit bias against Blacks and in favor of Whites causes people to treat those of different races differently without being aware of it. At the same time, White privilege "norms" disparate treatment and disparate outcomes and discourages self-examination by Whites. Through individual perceptions and interactions, implicit bias and White privilege affect institutional and social system culture.

In schools, for example, implicit bias creates higher expectations for White students than for Black students.⁹⁹ Teachers and other adults communicate these expectations through course selection, investment of relational time and energy, and even subtle cues such as how long they wait for a student to answer a question.¹⁰⁰ Students internalize and fulfill these expectations, which lead to academic success or a lack thereof.¹⁰¹ White privilege prevents White teachers teaching minority students from seeing implicit bias and how it operates to benefit or harm.

97. URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 83–105 (1979).

98. *Id.*; CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 35 (1973) ("men unmodified by the customs of particular places do not exist, have never existed, and most important, could not in the very nature of the case exist").

99. SMITH ET AL., *supra* note 6, at 64–72; Charles R. Lawrence III, *Education Law: Unconscious Racism and the Conversation About the Racial Achievement Gap*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 61, at 113.

100. SMITH ET AL., *supra* note 6, at 65–66.

101. *Id.* at 64–68; *see also* Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, 38 *URBAN EDUCATION* 460 (2003).

Implicit bias also operates in health care, criminal justice, housing, and employment¹⁰² in hospitals and doctors' offices, from police stops to judicial sentencing, in apartment rentals and mortgage lending, from hiring offices to promotion decisions. In all of these institutional contexts and more, implicit bias causes racially disparate actions and interactions, which result in racially disparate outcomes. White privilege's normalizing mantra inhibits the self-reflection that can lead to recognition of implicit bias.

Decentralized, incremental, non-overt, and "normed" actions that embody implicit bias do not constitute discrimination in the traditional legal sense. The non-linear links between individual interactions and collective results make tracing cause and effect extremely challenging: A localized action in a complex system such as an organization, region, or society influences but does not control system-level outcomes.¹⁰³ Instead, those outcomes emerge from the interactions of all the system's individuals.¹⁰⁴

Even individual interactions that are relatively free from implicit bias and White privilege can reproduce existing disadvantage or advantage. My own work, for example, has focused on how our apparently racially neutral inheritance law perpetuates racial wealth disparities.¹⁰⁵ Though our law provides for freedom of testation, most decedents direct their wealth to their families. Because most families are of one race, White wealth goes to the next generation of Whites, and Black wealth goes to the next generation of Blacks. Racial

102. See, e.g., Michele Goodwin & Naomi Duke, *Health Law: Cognitive Bias in Medical Decision-Making*; Charles Ogletree, Robert J. Smith, & Johanna Wald, *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*; Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*; Judge Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 61, at 95, 45, 25, 80. Other areas of implicit racial bias discussed in this collection include torts, communications, corporations, tax, intellectual property, environmental law, federal Indian law, capital punishment, and reparations.

103. Birute Regine & Roger Lewin, *Leading at the Edge: How Leaders Influence Complex Systems*, available at http://www.tandfonline.com/doi/abs/10.1207/S15327000EM0202_02#.VS6MIbo7PX8 ("Organizations, like complex adaptive systems, cannot be controlled or predicted to the degree that the mechanistic perspective implies; but their direction and how they evolve can be influenced.") (emphasis in original).

104. See, e.g., ROGER LEWIN & BIRUTE REGINE, *WEAVING COMPLEXITY & BUSINESS: ENGAGING THE SOUL AT WORK* 19–33 (2000, 2001); Strand, *Civic Underpinnings*, *supra* note 12, at 160–67. Cf. Palma Joy Strand, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983) (describing lack of linear causation for toxic waste injuries).

105. Strand, *Inheriting Inequality*, *supra* note 3, at 464–68.

economic advantage and disadvantage grounded in historical enrichment and disinvestment practices continue. Similarly, relatively affluent parents are better able to invest in their children's human capital through education.¹⁰⁶ Those with more (who are more likely to be White) pass down wealth in this manner; those with less (who are more likely to be Black) cannot.¹⁰⁷ Though there is not an absolute correspondence between wealth and race, there is sufficient correlation that any social institution that gives better outcomes for wealthy citizens and worse outcomes for poorer citizens reproduces the racial as well as the economic hierarchy.

President Lyndon Johnson said, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair."¹⁰⁸ This justification for affirmative action on an individual basis is consistent with Racism 3.0's emphasis on overt, linear, cause-and-effect discrimination. As opportunities for Black citizens have expanded, individual affirmative action has become more fraught in terms of its appropriateness.¹⁰⁹ But the kernel of Johnson's observation remains applicable to Racism 4.0's institutions and systems: Advantage and disadvantage *at the group level* reproduce over time *as a collective matter* absent counter-measures and absent affirmative interventions in the system.

III. Civity—Rewriting the “Software”

The anti-racism responses to Racism 3.0 (as well as earlier permutations) do not effectively address Racism 4.0. Current anti-discrimination law addresses intentional acts of discrimination that result directly in identifiable harms to specific individuals. Racism 4.0, however, operates primarily through unconscious acts of myriad individuals and the automatic reproduction of advantage and disadvantage that have arisen over time from past collective

106. Strand, *Education-as-Inheritance*, *supra* note 49, at 292–97.

107. There is a racial effect that operates in intergenerational elasticity in addition to a purely socioeconomic effect. *Id.* at 290. This may indicate the concurrent operation of implicit bias.

108. *Commencement Address at Howard University* (1965), http://www.pbs.org/wgbh/amex/eyesonthepize/sources/ps_bakke.html.

109. See, e.g., SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014) (eschewing affirmative action based on race for alternative approaches).

discrimination. The harms of Racism 4.0 are disparate group outcomes.

The quote at the beginning of the essay from the Rev. Dr. Martin Luther King, Jr. emphasizes that justice is a long-term goal. The derivation of that quote from the words of abolitionist Theodore Parker a century earlier highlights the realization that the struggle continues.¹¹⁰ The fundamental orientation of this essay is developing new responses to new manifestations of racism. Racism 4.0 calls us to search for, devise, and support ways to challenge it. In this Part, I offer strategies for neutralizing implicit bias and White privilege. In the next, I consider ways to address structural racism and white advantage.

A. Civility Defined

I have previously explored the civic conditions that lead to sustainable legal change.¹¹¹ In that exploration, I identified as key small-world civic social networks in which bridging relationships join people in distinct bonded groups.¹¹² When people tell their stories to others who are like them, they create a shared identity, which provides a valuable sense of autonomy. When they tell their stories to others who are unlike them, they forge bridging relationships, which offer interpersonal connections. When they see their stories in an overarching collective story, they experience relevance, which provides meaning.¹¹³ Bonding relationships provide safe, nurturing spaces; bridging relationships enable the emergence of a larger “we” from numerous smaller “we’s.”¹¹⁴

Two qualities of civic networks are particularly important for countering racism. The first is the existence of relationships that bridge between distinct, cohesive social groups. Race divides people

110. Vincent Harding spoke of the successful work of the Civil Rights Movement as calling for renewed, adaptive strategies: “Because this country has been changed, we must change too if we are going to continue to carry on the struggle. . . . You move into a struggle with certain kinds of visions and ideas and hopes. You transform the situation and then you can no longer go on with the same kinds of visions . . . because you have created a new situation yourselves.” FUNDI: THE STORY OF ELLA BAKER (Fundi Prod. 1981).

111. Strand, *Civic Underpinnings*, *supra* note 12, at 134–61 (general discussion and three contemporary applications).

112. *Id.* at 146–48.

113. *Id.* at 134–37; Strand, *Law as Story*, *supra* note 2, at 632–34, 639–42.

114. Strand, *Civic Underpinnings*, *supra* note 12, at 146–48.

into different social groups.¹¹⁵ Bridging, cross-racial relationships link these groups in a civic body that encompasses White and Black and indeed all races. Not every person in every race needs to be connected to individuals of another race, but strategic bridging relationships diminish the separation and isolation that lead to fragmentation and division.

The second important quality of civic networks is “power-with” respect in bridging relationships. Race by definition creates power differentials. “Power-with” respect based on shared humanity narrows those differentials. Respect grounds empathy and trust, which enable shared civic norms and stories¹¹⁶ as well as collaboration and creativity.¹¹⁷

In a single word, “civity” embraces all the aspects of civic networks. Civity describes social groups in which relationships of respect form civic networks that reach across social divides—divides such as race but also politics, geography, sector, and other socially salient characteristics that polarize and render difference destructive.¹¹⁸ Civity—civic “small-world” networks with bridging relationships of “power-with” respect—harnesses difference. With civity, diversity serves as the wellspring of resilience, creativity, and the capacity to adapt to internal and external challenges and stresses.¹¹⁹

B. Civity and Racism 4.0

Implicit bias and White privilege contribute to Racism 4.0 through innumerable interpersonal interactions. We can think of interactions that embody implicit bias as having a negative racial “valence” that communicates dysfunctional racial stereotypes and associations and reinforces racial hierarchy. Such interactions may be relatively “micro” but have substantial cumulative effects.¹²⁰ White privilege cloaks implicit bias, operating as a secret door that must be seen and opened for awareness to arise. In contrast, with civity,

115. Though this line has been shown to lack a basis in biology, it is nonetheless very real in terms of social effects. PBS, *Race: The Power of an Illusion*, *supra* note 29.

116. Strand, *Civic Underpinnings*, *supra* note 12, at 150–61.

117. *Id.* at 164–67.

118. *Id.* at 176–77; *What is Civity?*, THE CIVITY INITIATIVE, www.civity.org.

119. Strand, *Civic Underpinnings*, *supra* note 12, at 165–67. See also JOAN ROUGHGARDEN, *EVOLUTION'S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* (2004) (sex and genetic diversity enable adaptation).

120. See Tori DeAngelis, *Unmasking 'racial micro aggressions,'* 40 *MONITOR ON PSYCHOLOGY* 42 (2009).

cross-racial “power-with” relationships of respect have a positive racial valence and people of all races are aware of both the importance of cross-racial bridging relationships and the quality of those relationships. Civility nullifies implicit bias and White privilege on their own terms.

While implicit bias may be pervasive, it is also malleable.¹²¹ Once aware of implicit bias, we can take action to diminish or eliminate it; we can also monitor ourselves for actions we might be inclined to take instinctively that stem from implicit bias. Similarly, once aware of White privilege we can be rigorous with ourselves, intentionally acknowledging privilege and acting to counter it.

Each of us has the ability to create civility by entering into “power-with” relationships of respect across divides. In fact, “[b]ecause the links in social networks are created by the people in those networks, creating civic networks [civility] is something that *only we can do*.”¹²² Building the civility that nullifies Racism 4.0 calls for “power-with” relationships of respect across racial lines. And, as with all civility, creating the necessary cross-racial civic relationships “is something that *only we can do*.”

How do we do this? Awareness and communication. We pay attention to the importance of forging relationships across racial lines and especially the valence of those relationships. We interact with others who are of a different race. We tell stories about our experiences and listen to and learn from those of others. Renowned storyteller J.G. “Paw-paw” Pinkerton said: “Storytelling is a shared experience, and shared experiences are the basis of all relationships.”¹²³ Cross-racial storytelling is a powerful way to heighten awareness of the privilege that impedes authentic cross-racial conversation; to enter into cross-racial relationships; to confront our unconscious race-based stereotypes, associations, and biases; and to expand our racial horizons in ways that rework those stereotypes, associations, and biases.¹²⁴ New relationships, new collective identities, and new collective stories emerge.¹²⁵

121. STAATS, *supra* note 61, at 17.

122. Strand, *Civic Underpinnings*, *supra* note 12, at 157 (emphasis in original).

123. Jewish-Palestinian Living Room Dialogue Group, *What Storytellers Say About Story*, THE INTERNATIONAL STORYTELLING CENTER, <http://traubman.igc.org/story.htm> (last visited Apr. 1, 2015).

124. SMITH ET AL., *supra* note 6, at 175.

125. Strand, *Civic Underpinnings*, *supra* note 12, at 123–24, 128–30, 133–34, 153–57; Strand, *Law as Story*, *supra* note 2, at 624–26.

We, especially White people, are often not practiced at this. White privilege enables many to live without engaging with or talking much about race. The downside of White privilege is missing out on so much of what is happening in the world, on the experiences and stories of so many. Though rejecting White privilege calls for opening ourselves to stories and experiences that it may be uncomfortable to hear, it transforms our view from monochrome to Technicolor.

Cross-racial conversation about race may feel risky. This past fall, Creighton's School of Law and 2040 Initiative hosted "Talking About Race: A Conversation with Jamelle Bouie." Bouie writes about politics, policy, and race for Slate.com.

In the Q&A session at the end of the hour, a White student raised his hand. He said that he is interested in talking about race but fearful of saying the wrong thing.

Mr. Bouie's . . . advice was to just take the plunge: It is better to get "pie on your face" than to never say anything. The key is to start, to be in the conversation. Conversations about race, he said, are so few and so fraught that we need to have them, even if something goes awry.¹²⁶

The conversations, storytelling, and relationship-building that counter the "software" of Racism 4.0 also build civity, which enables collaboration, creativity, and resilience.

C. Building Civity Institutionally and Systemically

Because every individual has the power to heighten awareness and to engage in relationships that seed change, each of us can counter Racism 4.0 and build civity. This "bottom up" work can be encouraged within institutions and more broadly. Leaders can articulate a cultural story that explicitly values cross-cutting relationships and work to create an environment that supports building them.

I have written previously of two examples of anti-Racism 4.0 civity-building initiatives here in the United States. In the first, an

126. Palma Joy Strand, *2040 Book: 'Americanah' by Chimamanda Ngozi Adichie*, THE CREIGHTON 2040 INITIATIVE (Dec. 2, 2014), available at <http://blogs.creighton.edu/creighton2040/2014/12/02/2040-book-americanah-by-chimamanda-ngozi-adichie/>.

effort in which I was personally involved, the Arlington Public Schools (“APS”) in Arlington, Virginia, directly tackled relationships communicating low expectations to Black and Latino students:

As a result of a collaborative effort involving the school board, the Superintendent, administration and other school system personnel, teachers, and parents, APS concluded that institutional racism must be addressed by changing the individual interactions between students and teachers. To reach into and transform those interactions, APS developed “cultural competence training” for all instructional personnel that calls for self-awareness of implicit bias and privilege. The goal is to raise expectations and change pedagogy by teachers who are mostly White for a student body that is majority students of color.¹²⁷

APS responded to racially disparate outcomes with a system-wide initiative to transform cross-racial, cross-ethnic, student-teacher relationships for the better. Consistent with a civility approach, APS recognized that “[i]t is . . . in classrooms, hallways, and on the playground before, during, and after school that kids experience school—whether they feel anonymous and disrespected and likely to fail or known and respected and likely to succeed.”¹²⁸

On a much larger scale, President Obama’s Department of Housing and Urban Development proposed regulations in 2013 to begin to reverse the residential segregation that haunts us.¹²⁹ The regulations sought to implement the “affirmatively further fair housing” (“AFFH”) requirement of the Fair Housing Act of 1968—a requirement that has languished for almost fifty years—by

provid[ing] that HUD will supply local entities with comprehensive data on housing patterns related to race, ethnicity, poverty, employment, environment, and transportation. Local entities engaged in community planning will thus be in a better position to

127. Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 333 (citing SMITH ET AL., *supra* note 6).

128. SMITH ET AL., *supra* note 6, at 73.

129. See Department of Housing and Urban Development, Affirmatively Furthering Fair Housing: Proposed Rule, 78 FEDERAL REGISTER 43710 (July 19, 2013).

not simply prohibit housing discrimination but to affirmatively further fair, equitable, and integrated housing [The thrust of the regulations was enabling] local governments . . . to facilitate more bridging relationships within neighborhoods through increased residential integration.¹³⁰

The federal government proposed addressing regional housing disparities by reversing entrenched patterns of separation. The regulations recognized that reversal of residential segregation resulting from large-scale, legalized, collective government policies in the past calls for large-scale, legalized, collective government policies in the present. These proposed regulations have not been issued in final form.

A third example, hailing from India, focuses on Hindu-Muslim religious division, which can erupt into violence. Comparing levels of violence in Indian cities, sociologist Ashutosh Varshney found: "The key determinant of peace is interconnected civic life . . ."¹³¹ In civity terms, "associational [inter-ethnic] bridges . . . play an essential role at the system or city level by linking bonded groups sufficiently to enable social responses to shocks that protect against internal violence."¹³² To the question: "Can civic links be forged?"¹³³ Varshney responds in the affirmative. He describes an initiative in the town of Bhiwandi, where the police chief brought together individual Hindus and Muslims from religiously segregated neighborhoods.

If the Hindus and Muslims could meet each other often enough and discuss common problems, a reservoir of communication and perhaps trust would be created, which in turn would play a peace-making role at the time of communal tensions

Seventy such committees were created to cover the entire town. They would discuss "matters of mutual

130. Strand, *Cultivating "Civity,"* *supra* note 13, at 179.

131. ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE: HINDUS AND MUSLIMS IN INDIA* 282 (2002).

132. Strand, *Cultivating "Civity,"* *supra* note 13, at 170 (summarizing and characterizing VARSHNEY, *supra* note 131).

133. VARSHNEY, *supra* note 131, at 289.

concern.” They would meet as necessary, at least once a week normally but daily in times of tension, with a police officer presiding. And as time wore on, they turned out to be so successful that even non-members started attending important meetings, thus broadening “the base of mutual confidence.”¹³⁴

These Bhiwandi committees, in the face of a religiously divisive national incident, brought together Hindus and Muslims to keep the peace.¹³⁵

Leaders who recognize the transformative power of bridging relationships have at hand the means for creating conditions that encourage the forging of those relationships. When leaders seize the opportunity to nurture civity-building relationships, they embrace an institutional and systemic understanding of change. As they focus on cross-racial bridges, civity grows and Racism 4.0 declines.

IV. Rewiring the “Hardware”

Without affirmative counter-measures, structural racism and white advantage reproduce themselves. Eliminating Racism 4.0 calls for rewiring institutions and social systems. These actions, like the abolition of slavery, like the Great Migration, and like the invalidation of segregation, must be sweeping: Structural racism and white advantage reach wide and deep.

Imagining the sweeping transformations that will root out Racism 4.0 is an imperative: A vision of where we are headed energizes, motivates, engenders hope, and calls us to create the civity that makes possible both clearer discernment of and active movement toward that vision. In this Part, painting with a broad brush, I offer a grand design for bringing that vision to life. Three touchstones respond to the disparities of Racism 4.0. Each benefits Whites and people of other races as well as Black citizens. This “interest convergence”¹³⁶ arises because the fates of all races lie together. Interest convergence fuels movement toward equity and justice by overcoming deep-seated instincts of Whites to act to the disadvantage

134. *Id.* at 293–94.

135. *Id.* at 294.

136. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–28 (1980).

of Blacks “just because” and enabling them to act to further aligned interests.¹³⁷

A. Tax and Invest Progressively Throughout the Nation

The United States government has invested substantial funds, both directly and indirectly, in programs to increase the wealth and well-being of the citizenry. These funds were public funds raised through taxes on the general population. As described above, many of these programs increased the wealth and well-being of the White citizenry without substantial benefit for Black citizens: White advantage and Black disadvantage.

Relative economic equality¹³⁸ and high taxes¹³⁹ during the decades between the end of World War II and the late 1970s enabled substantial investment in public infrastructure.¹⁴⁰ About the time that the civil rights legislation of the 1960s began to bear fruit and increased immigration brought more non-Whites, especially Latinos, to the nation, public support for taxes to invest in the common good declined. Since about 1980, when Ronald Reagan was elected President, anti-tax rhetoric and action benefitting those who are better off¹⁴¹ has led to sky-high levels of economic inequality¹⁴² and reduced support for public infrastructure.¹⁴³

It was not, perhaps, a coincidence that Reagan hailed from California, which was ahead of the national curve both in shifting racial and ethnic demographics and in anti-tax initiatives.¹⁴⁴ Research shows that older White voters are less likely to vote in favor of taxing themselves to support public investment such as schools for children

137. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 294.

138. JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY* 4 (2012).

139. Ben Walsh, *Economists Say We Should Tax the Rich at 90 Percent*, HUFF POST BUSINESS (Oct. 22, 2014), http://www.huffingtonpost.com/2014/10/22/economists-tax-rich_n_6024430.html.

140. Bryce Covert, *Government Investment Hits Lowest Level Since World War II*, THINK PROGRESS (Nov. 4, 2013), <http://thinkprogress.org/economy/2013/11/04/2881611/government-investment-fall/>.

141. Walsh, *supra* note 139.

142. STIGLITZ, *supra* note 138, at 5, 8; EDWARD N. WOLFF, *TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT* 8 (2002).

143. Covert, *supra* note 140.

144. Teresa Wiltz, *Racial Generation Gap Looms Large for States*, THE PEW CHARITABLE TRUSTS (Jan. 16, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/16/racial-generation-gap-looms-large-for-states>.

who do not look like them, who are not White.¹⁴⁵ The states of the former Confederacy with large Black populations have a knee-jerk reaction against programs that benefit the citizenry at large;¹⁴⁶ the instinct to deny Black citizens the benefits of public investment goes deep.¹⁴⁷ Politicians respond to their wealthier constituents,¹⁴⁸ who are more likely to be White.

The fallout from decades of disinvestment in the public is evident all around us: crumbling physical infrastructure;¹⁴⁹ children and youth who are not receiving the support they need to develop their abilities to contribute economically and in other ways;¹⁵⁰ middle class families sinking under the weight of lagging wages, disappearing jobs, and increasing educational and other expenses. Black (and Latino) families and children, because of their relative lack of economic resources, are less able to substitute private for public goods. Thus, they are disproportionately affected by this public disinvestment.

A generation from now, non-Hispanic Whites are projected to be a minority of the nation's population.¹⁵¹ For a long time, disinvestment in Blacks (and Latinos) has been a disadvantage for an easily disregarded sliver of the whole. This disinvestment is now becoming a disadvantage for the whole: From a purely economic perspective, racially tinged inequality dampens growth and resilience.¹⁵² White and non-White interests are converging: What is good for non-Whites is good for Whites, is good for all of us.

We need public investment to strengthen our national infrastructure—physical and human. That public investment must be paid for, and we must tax ourselves to pay for it. The taxes and

145. David N. Figlio & Deborah Fletcher, *Suburbanization, Demographic Change and the Consequences for School Finance*, NBER Working Paper No. 16137 33–35 (June 2010).

146. See *supra* notes 93–96 and accompanying text.

147. See Christopher D. DeSante, *Working Twice as Hard to Get Half as Far: Race, Work Ethic, and America's Deserving Poor*, 57 AMER. J. POL. SCI. 342 (Apr. 2013) (“racial resentment” negatively affects willingness to award Blacks public benefits).

148. LARRY M. BARTELS, ECONOMIC INEQUALITY AND POLITICAL REPRESENTATION (Aug. 2005), available at <http://www.princeton.edu/~bartels/economic.pdf>.

149. *America's crumbling infrastructure: Bridging the gap*, THE ECONOMIST (June 28, 2014), available at <http://www.economist.com/news/united-states/21605932-country-where-everyone-drives-america-has-shoddy-roads-bridging-gap>.

150. Strand, *Education-as-Inheritance*, *supra* note 49, at 301.

151. See ORTMAN, *supra* note 8.

152. SARAH TREUHAFT ET AL., THE EQUITY SOLUTION: RACIAL INCLUSION IS KEY TO GROWING A STRONG NEW ECONOMY 2–3 (PolicyLink Oct. 22, 2014), available at http://www.policylink.org/sites/default/files/Equity_Solution_Brief.pdf.

investment, moreover, must be progressive. We need to invest to bring into the fold of prosperity those who were excluded in prior waves of public taxes and investment. We need progressive investment in children and youth—in child care, K-12 education, college, and all the supports kids need to succeed there.¹⁵³ We need progressive investment in health, families, housing, transportation, and more.

The lion's share of this investment must be federal because the federal government is in the best position to make the level of investment required. When the federal government acts it expresses the national will, which, in this case, is a national commitment to investing in those who have previously been regarded as not worthy of investment. Federal investment makes the statement that those who are invested in are an essential part of the nation. The Homestead Acts, Social Security, home mortgages, and the interstate highway system were all national investments that spoke of the value of citizens. Today we need forward-looking national investment that will, through collective affirmative action, build our collective strength for the next generation.

B. Regionalize Our Metropolitan Areas

Our metropolitan areas are the engines of the nation. More than four-fifths of the population lives in urban areas.¹⁵⁴ And our metropolitan areas, especially the large ones, are ahead of the demographic curve in shifting away from non-Hispanic White majorities:

America's largest 150 metropolitan regions are home to the vast majority of the nation's economic activity (80 percent) and population (72 percent). They are also at the vanguard of rising diversity: communities of color are driving population growth in almost all of these metros, and their economic fate hinges on whether Latinos, African Americans, and other diverse groups can participate and thrive.¹⁵⁵

153. Strand, *Education-as-Inheritance*, *supra* note 49, at 298–301.

154. *Frequently Asked Questions*, UNITED STATES CENSUS BUREAU, <https://ask.census.gov/faq.php?id=5000&faqId=5971> (last visited Mar. 18, 2015) (“The urban areas of the United States for the 2010 Census represent [] 80.7% of the population . . .”).

155. TREUHAFT ET AL., *supra* note 152, at 5.

President Obama emphasized the national importance of the health of our metropolitan areas in his 2015 State of the Union address.¹⁵⁶ In significant part because of the high Black, Asian, and Latino populations in metro areas, the economic penalty for racial inequity is higher there than in the nation as a whole. The national GDP would be 14% higher with racial equity.¹⁵⁷ The bonus for racial equity in the nation's 150 largest metro areas would be 24%, "ranging from a low of 2 percent in both Portland, Maine, and Springfield, Missouri, to a high of 131 percent in Brownsville, Texas."¹⁵⁸

Our metropolitan areas are also landscapes of advantage and disadvantage. Redlining created racially segregated neighborhoods that are very much visible today.¹⁵⁹ These neighborhoods are often located in different local jurisdictions. Generous incorporation and district creation policies in many states have created what urbanist Neal Peirce calls the "governance gap."¹⁶⁰ multiple jurisdictions within a region (what Peirce calls a "citistate") pulling against rather than with each other. Jurisdictions with wealthy citizens (often White) and robust tax bases are loath to literally "share the wealth" with neighboring jurisdictions with less-well-off citizens (often Black or Latino) and ailing tax bases. "Torn social fabric" (lack of racial civity) and "sprawl" (physical separation of wealthy suburban Whites from poorer urban minorities), along with the "governance gap," sap energy and undermine regional well-being and prosperity.¹⁶¹

School districts play a major role in perpetuating regional disparities, a role that United States Supreme Court decisions in the 1970s solidified as to both economics¹⁶² and race.¹⁶³ Subsequent legal challenges under state constitutional law have resulted in equalization of school funding,¹⁶⁴ but significant economic disparities remain—not only between districts within states but between districts in different

156. National League of Cities, *President Obama 'Goes Local' with New Initiatives in State of the Union Address*, NATIONAL LEAGUE OF CITIES (Jan. 20, 2015), <http://www.nlc.org/media-center/news-search/president-obama-%E2%80%98goes-local%E2%80%99-with-new-initiatives-in-state-of-the-union-address>.

157. TREUHAFT ET AL., *supra* note 152, at 4.

158. *Id.* at 5.

159. See Heller School for Social Policy and Management, *supra* note 50.

160. NEAL R. PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 32–35 (1993).

161. *Id.* at 17–32.

162. See *Rodriguez*, 411 U.S. 1.

163. See *Milliken*, 418 U.S. 717.

164. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 296–97.

states.¹⁶⁵ We are left with “public” schools and school districts that in fact represent a wide range of “private” investment in the form of ability or lack of ability to buy into a “good” school district.¹⁶⁶ “Good” and “bad” schools and school districts coexist in all metro areas.

States have, by and large, declined to acknowledge the organic, integrated nature of metropolitan regions. Revenue sharing in the Twin Cities in Minnesota¹⁶⁷ and coordinated land use planning in Portland, Oregon¹⁶⁸ are exceptions that reveal the rule. In state legislatures, those who represent suburban and urban districts often see their interests as opposed rather than aligned.¹⁶⁹ Many metro areas, moreover, cross state lines, making regional cooperation an even greater challenge. Overall, actions based on the awareness that everyone in a region rises and falls together are far from the norm.

A significant step toward regional coordination can be traced back to federal initiatives in the 1970s that required planning for federal investment across jurisdictional lines.¹⁷⁰ Regional environmental efforts, for example, were necessary because water and air cross local jurisdictional boundaries. More recently, the “Sustainable Communities” grant program, administered by the Departments of Housing and Urban Development and Transportation and the Environmental Protection Agency, has supported regional planning for equity and sustainability.¹⁷¹

Regional coordination in the form of networks of collaboration among local actors does exist. It emerges when local leaders see

165. *Id.* at 342.

166. “Private” ability, however, actually enjoys substantial public subsidy in the form of the home mortgage interest deduction, which increases as the cost of one’s home rises. See Langbein, *supra* note 92 and accompanying text.

167. See *Fiscal Disparities: Tax-Base Sharing in the Metro Area*, METROPOLITAN COUNCIL, <http://www.metrocouncil.org/Communities/Planning/Local-Planning-Assistance/Fiscal-Disparities.aspx> (last visited Mar. 18, 2015).

168. See GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 522–32 (6th ed. 2015).

169. Margaret Weir, Harold Wolman, & Todd Swanstrom, *The Calculus of Coalitions: Cities, Suburbs, and the Metropolitan Agenda*, 40 URBAN AFFAIRS REV. 730, 747–50 (2005).

170. Antonio Vlassis, *Council of Governments* (COG), ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1920547/council-of-governments-COG> (last updated Mar. 28, 2013).

171. *Sustainable Communities Regional Planning Grants*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_resilience/sustainable_communities_regional_planning_grants (last visited Mar. 18, 2015).

shared interests and act to forge cross-jurisdictional working relationships (civity) to address common issues. This kind of regionalism, though effective with respect to specific challenges, neither brings all affected to the table nor extends to the multiple ways in which local outcomes in a region are intertwined.

We need comprehensive and more effective regional coordination—systemic reforms to shift local jurisdictions toward seeing their interdependence with their regional neighbors and acting out of that understanding. Federal investment in metropolitan regions, with strings attached, moved the environmental and transportation needles. Federal investment in metropolitan regions can move the equity needle today. And this investment must bring along reluctant, even recalcitrant states and locals.

C. Recognize Economic, Social, and Cultural Human Rights

The United States is behind the international curve on economic, social, and cultural human rights. Decades ago, the United Nations adopted the International Covenants on Civil and Political Rights (“ICCPR”)¹⁷² and on Economic, Social and Cultural Rights (“ICESCR”).¹⁷³ The ICCPR declares that all people have human rights including traditional civil and political rights associated with the “popular control” value of democracy.¹⁷⁴ These rights are well-represented in the United States Constitution: freedom of speech, expression, and religion; equal protection by race, ethnicity, and gender; the right to political self-determination; criminal process protections; liberty rights.¹⁷⁵ As a signatory, a process that was completed with Senate ratification in 1992, the United States agrees to protect and support those rights.¹⁷⁶

The ICESCR declares that all people have economic, social, and cultural rights including the right to work, appropriate conditions of work, and the right to form and join trade unions; family protections including paid leave and/or benefits for working mothers; clothing,

172. International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966).

173. International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

174. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 289.

175. U.S. CONST. art. I, art II; U.S. CONST. amend. I, IV, V, VI, XIV.

176. See ICCPR, *supra* note 172, pt. I, art. 1, § 3; Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, THE CARTER CENTER (June 29, 1992), <http://www.cartercenter.org/news/documents/doc1369.html> (noting also that U.S. had not yet ratified ICESCR).

food, and housing; health care; education; and the right to participate in cultural and scientific life.¹⁷⁷ These rights, which give effect to “equality,” the other primary value of democracy,¹⁷⁸ are not guaranteed by the United States Constitution.

Protection of civil and political rights juxtaposed with lack of protection of economic, social, and cultural rights reflect our own democratic progression. Historically, our nation’s Constitution focused heavily on popular control. Only over time did equality as a democratic value gain traction, and only within the last half-century or so has its constitutional place been secured in practice.¹⁷⁹ The Constitution’s mandate for equal treatment, however, has not been joined by rights to ensure equality of opportunity, of equal chance to develop human capabilities,¹⁸⁰ or of equity. Constitutional Equal Protection doctrine lacks the economic, social, and cultural rights that enable equal outcomes. As we have seen, neutral law reproduces inequality. Economic, social, and cultural rights, in contrast, dismantle inequality.

Reflecting equality’s delayed rise in this country, the United States has not—as yet—become a signatory to the ICESCR,¹⁸¹ and most of the rights it guarantees are only partially protected here. We have (only recently) the Affordable Care Act,¹⁸² yet the refusal of many states to extend Medicaid leaves millions of people—including many of our most vulnerable citizens—without health care.¹⁸³ We have trade unions, yet many workers in many states cannot avail

177. See ICESCR, *supra* note 173, pt. III, art. 6–15.

178. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 299.

179. *Id.* at 283–84.

180. See Palma Joy Strand, *Do We Value Our Cars More Than Our Kids? The Conundrum of Care for Children*, 19 DUKE J. GENDER L. & POL’Y 1, 27–28 (2011) (drawing from the work of philosopher Martha Nussbaum).

181. Ann Picard, *The United States’ Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 THE SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 231, 240 (2010).

182. Patient Protection and Affordable Care Act, Pub. L. 111–148, 124 Stat. 119 (2010). Almost five years after its passage, there continues to be substantial opposition to “Obamacare.” See Reihan Salam, *The Anti-Obamacare FAQ*, SLATE (Nov. 14, 2014), available at http://www.slate.com/articles/news_and_politics/politics/2014/11/obamacare_faq_everything_you_need_to_know_about_why_conservatives_want_to.html.

183. See Sabrina Tavernise & Robert Gebeloff, *Millions of Poor Are Left Uncovered by Health Law*, N.Y. TIMES (Oct. 3, 2013), available at http://www.nytimes.com/2013/10/03/health/millions-of-poor-are-left-uncovered-by-health-law.html?hp&_r=1&pagewanted=all.

themselves of those protections.¹⁸⁴ We have a minimum wage, not a living wage.¹⁸⁵ We have inadequate leave for working parents.¹⁸⁶ Every state constitution guarantees a public K-12 education,¹⁸⁷ yet higher education is not “equally accessible to all, on the basis of capacity.”¹⁸⁸

Currently, the rhetoric of equality in the United States far surpasses the reality. If we are serious about valuing equality, we need to get serious about the rights that make it real. It is past time that the United States signed on to the ICESCR. In doing so, the United States agrees to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures.”¹⁸⁹ Once the United States signs, taking action to ensure and protect the ICESCR rights becomes a national responsibility and gives the federal government power to execute the treaty domestically, even if doing so brings the national government into arenas that generally fall within state purview.¹⁹⁰

The states, with broad general powers, can also take initiative vis-à-vis economic, social, and cultural rights.¹⁹¹ To the extent that states declare these rights to be integral to a functioning democracy, they have leverage to seek financial support from the federal government under Article IV of the United States Constitution, which provides that “[t]he United States shall guarantee to every

184. See Nick Heynen, *Interactive Map: States with Right-to-Work Laws*, MADISON.COM (Dec. 2, 2014), http://host.madison.com/news/local/govt-and-politics/interactive-map-states-with-right-to-work-laws/html_6de12bf1-8ae8-5cb9-901f-b9eec38df1e5.html; Plumer, *What Do “Right-to-Work” Laws Do to a State’s Economy?*, WASH. POST (Dec. 10, 2012), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/10/how-right-to-work-laws-could-reshape-michigans-economy>.

185. See, e.g., Theresa Riley & Charina Nadura, *Minimum Wages Are Rising in Most States, But It’s Still Not Enough to Make the Rent*, MOYERS.COM (Nov. 6, 2014), <http://billmoyers.com/2014/11/06/states-will-now-higher-minimum-wage-one-set-congress/>.

186. See Gretchen Livingston, *Among 38 Nations, U.S. is the Outlier When it Comes to Paid Parental Leave*, PEWRESEARCH.ORG (Dec. 12, 2013), <http://www.pewresearch.org/fact-tank/2013/12/12/among-38-nations-u-s-is-the-holdout-when-it-comes-to-offering-paid-parental-leave/>.

187. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 295.

188. ICESCR, *supra* note 173; U.S. CONST. art. XIII, § 2; Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 315–16.

189. ICESCR, *supra* note 173; U.S. CONST. art. II, § 1.

190. *Missouri v. Holland*, 252 U.S. 416 (1920).

191. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 295.

State in this Union a republican form of government.”¹⁹² Though this constitutional clause has most generally been invoked in the context of the United States imposing requirements on the states,¹⁹³ it can also serve to give the states the ability to seek carry-through from the United States in ensuring democratic—republican—minima.¹⁹⁴

V. Re-Constitution

Civty-building and the three touchstones for dismantling Racism 4.0’s “hardware” are closely linked. Civty’s cross-racial relationships of respect pull toward greater equity as manifested in the progressive tax and investment touchstone. Civty’s empathy in the form of awareness of racial interdependence calls us toward robust democracy at multiple scales as reflected in the regionalization touchstone. And civty’s cross-racial trust opens the door to a contemporary understanding of a republican form of government as embodied in the social, economic, and cultural rights touchstone.

All three civic and civty-based touchstones evince a transformed sensibility of our political and legal constitution. Each of them calls for blurring of conventional institutional boundaries. Progressive taxation and investment on a nationwide basis necessitates federal investment in states and localities that have historically resisted such investment. Regionalization of metropolitan areas calls for federal, state, and local governments to pull together to support a traditionally unrecognized level of governance. Realization of economic, social, and cultural rights requires federal and state governments to hash through shared responsibility and authority.

All three touchstones embrace governance in which distinct governmental institutions act as enmeshed and networked entities, working through difference and conflict to generate creative solutions. Governments are networked, and conflict plays a positive role, just as the body civic is networked and powered by difference.

Conventional understanding of our constitutional structure is based on “separation of powers.” Substantial rhetoric and case law offer “formalist” and “functionalist” interpretations and applications of the doctrine.¹⁹⁵ The reality, however, is interwoven and shared

192. U.S. CONST. art. IV, § 4.

193. See, e.g., Erwin Chemerinsky, *Why Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 849 & n.1 (1994) (citing cases).

194. See Strand, *Is Brown Holding Us Back?*, *supra* note 11, at 328–31.

195. See John F. Manning, *Separation of Power as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–44, 1950–71 (2011).

power through assignments of specific authority combined with mandates of necessary interaction.¹⁹⁶

Networked entities working together to govern is increasingly recognized as not only the constitutional structure and reality but the way of the world in practice.¹⁹⁷ In essentially every public arena, all parts of the federal government and federal, state, and local entities coordinate and collaborate to govern. Education, health, roads, gun regulation, economic development, housing, employment, crime, definition of family relationships, and more—all reflect networked governance. While each governmental entity has its core functions, there is substantial overlap.

Relational, networked governance is dynamic. Initiative courses through the system. Sometimes the federal government is in the lead. Sometimes the locals are ahead. Sometimes states are at the forefront. The same is true of legislative, executive, and judicial bodies.

This dynamism not only allows for conflict; it runs on conflict. Leadership and civic author Parker Palmer observes:

[T]his country was born out of conflict. At the Constitutional Convention of 1787, 30 percent of the delegates walked out without signing the thing—and those who did sign disagreed so fundamentally that they were forced to create a conflict-holding system of government. In fact, they created the first form of government that treats conflict not as the *enemy* of a good social order but as the *engine* of a better social order. Conflict can be creative, and we have to recover that sensibility.¹⁹⁸

Difference—diversity—is the raw material of conflict and creates resilience in a system, if it can be harnessed.

196. *Id.* at 1944–45 (“[T]he Constitution adopts *no freestanding principle of separation of powers*. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale. The Constitution contains no Separation of Powers Clause . . . the idea of separation of powers, properly understood, reflects many particular decisions about how to allocate and condition the exercise of federal power”) (emphasis in original).

197. See generally, NETWORKED GOVERNANCE: THE FUTURE OF INTER-GOVERNMENTAL MANAGEMENT (Jack Meek et al. 2011).

198. David Bornstein, *Reclaiming “We the People,” One Person at a Time*, N.Y. TIMES (Sept. 4, 2014) (interviewing and quoting Parker Palmer) (emphasis in original).

Palmer points to the “venues in which we live our lives—families, neighborhoods, classrooms, congregations and voluntary associations—[as the] vital *infrastructure* of democracy.”¹⁹⁹ He raises up the importance of “talking about what we love, because a lot of us love the same things . . . [and] we all doubt that what we love is being served well. Beginning a conversation with loves and doubts rather than political ideologies opens a new door to dialogue, driven by story-telling rather than political point scoring.”²⁰⁰ He concludes: “[I]f you’re not humanly connected, you have no chance to pursue . . . complex issues communally in a way that might be transformative.”²⁰¹

Palmer’s emphasis on human relationship as grounding governance echoes a civity view and highlights the connection between civic and government. If we the civic are splintered and conflict-riven, the collective story that emerges and that our governing bodies reflect is splintered and conflict-riven. If we build civity, the collective story is about relationships among distinct bodies and connecting through difference to generate ideas and energy. With civity, dismantling institutional and systemic racism is possible.

Civic movements generate fundamental changes in our collective story—expressed in popular sentiment and in law.²⁰² Civic movements sculpt and “re-constitute” our social and psychological constitution by shifting our collective perception of who we are as a people. From this re-constitution emerges a re-constituted political and legal constitution²⁰³ that gives formal expression to the newly formed collective story.²⁰⁴ To overcome Racism 4.0, we need both civity and the re-constitution—social, psychological, political, and legal—that will result.

199. *Id.* (emphasis in original).

200. *Id.*

201. *Id.*

202. See, e.g., Strand, *Civic Underpinnings*, *supra* note 12, at 150–61.

203. Strand, *Law as Story*, *supra* note 2, at 608–26.

204. See generally ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION 1* (2014) (offering four historical examples of civic movements leading to constitutional evolution: “the revolutionary path to independence and formation of state constitutions; the drafting, ratification, and amendment of the U.S. Constitution; the antislavery reconstruction; and the women’s suffrage reconstruction”).

* * *